

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
FROM THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

In the Matter of)
)
 Q L) OAH No. 18-0339-CCA
) Agency No.
_____)

DECISION

I. Introduction

Q L is an approved relative child care provider who provides child care in her home. She also has a separate business known as Company A (Company A), which operates in the garage of her home. Company A has employees, some of whom are related to the children, and one of whom is not related to the children. These employees have access to a bathroom in the home where child care is provided.

In July 2017, the Department of Health and Social Services, Division of Public Assistance (Division), Child Care Program Office (CCPO) notified Ms. L that all child care providers needed to obtain a valid background check both for themselves and for anyone in the home who came into contact with the children receiving child care. The CCPO had a variety of communications with Ms. L on the issue, which ultimately resulted in the CCPO notifying Ms. L on February 14, 2018 that her status as an approved child care provider would be rescinded as of the end of February 2018 “because you did not obtain a valid background checks for all employees of your business and yourself who have contact to the children in care.”¹

Ms. L and her employees, both those who are related to the children in care and the one employee not related to the children in care, are all subject to the background check requirements contained in Alaska regulations. Ms. L partially complied by submitting her own application, albeit on February 16, 2018, which was approved. Her individual noncompliance cannot therefore be used as a basis for revocation of the approval of her child care provider status.

Ms. L, however, did not apply for background checks for the employees of her separate business. The evidence shows that the background check application process, which is done online, can be confusing with regard to persons such as Company A’s employees, who are not employees of the child care business. Regardless, Ms. L was on notice of the requirement that her Company A employees needed to have background checks in July 2017, was given a copy of the instructions on how to apply for background checks in September 2017 and had ample

¹ Ex. 8.

opportunity to navigate the background check process for them and did not. This failure to apply for background checks for the employees of her separate business is grounds for termination of her approval to be a child provider. Accordingly, that termination is upheld.

II. Facts

Ms. L requested a hearing to challenge the termination of her approval to be a child care provider. The hearing was held on April 17, 2018. Ms. L represented herself and testified on her own behalf. Sally Dial represented the Division. Savitry Brower and Ambra Mavis with the CCPO, and Karen Benson with DHSS's background check unit, all testified on behalf of the Division. After a review of the testimony and the exhibits submitted by the parties, the following facts were established by a preponderance of the evidence.

Ms. L is an approved relative child care provider. She provides care in her own home for several of her grandchildren. She also is the owner of a separate business, Company A. That business operates out of her garage. The business has several employees. Two of those employees are direct relatives (parents of two children and aunt and uncle of the other children) of children in Ms. L's care. One of the employees has no biological or other relationship to the children in Ms. L's care. The business does not have a separate bathroom; its employees enter Ms. L's home to use the bathroom located within the home. The only barrier or separation between the bathroom and the portion of the home where the children are cared for is a child gate.²

On July 7, 2017, the CCPO notified Ms. L that there was a change to the state regulations which "required[d] all child care providers and individuals associated with the child care ... to have a valid fingerprint based background check conducted by the Alaska Background Check Program (BCP)."³ That same notice advised Ms. L that she had to comply with the background check requirement "at the time you renew your [Child Care Assistance Program] participation or by December 31, 2017, whichever occurs first."⁴

On September 5, 2017, in response to an investigation by the CCPO, Ms. L stated in writing that she would comply with the background check requirement for her then two non-relative employees, but that the other employees were related to the children in her care.⁵ On September 14, 2017, the background check unit sent Ms. L her username, which enabled her to

² Ms. L's testimony.

³ Ex. 2.

⁴ Ex. 2.

⁵ Exs. 3, 4.

access the background check online application system. She was also sent a manual on how to use the online application system at the same time.⁶ On November 2, 2017, Ms. L was again notified by the CCPO of the background check requirement, and that it needed to be completed by December 31, 2017.⁷

Ms. L was sent notice on February 14, 2018 that her child care provider's authorization would be revoked at the end of February 2018 because she had not complied with the background check requirements for either herself or for the employees of her separate business.⁸ Ms. L called the CCPO on February 16, 2018, where she spoke to Ms. Brower. Ms. L testified that she asked Ms. Brower if she would retain her approved child care provider status if she obtained the necessary background checks by February 28, 2018.⁹ Her testimony was corroborated by Ms. Brower's case note dated February 16, 2018:

[Eligibility Technician] stated to provider that she still need to obtain a valid background check for others . . . that come in to the child care home on a regular basis by 02/28/18 or [her child care approved provider] status will end and provider will need to reapply. Provider understood stated she will get the background process started today for the employees of the business on the premises of the child care and herself today.¹⁰

Ms. L started the online application process for herself on February 16, 2018. She received her background check clearance on March 6, 2018, which was subsequently linked to her child care provider account on April 12, 2018. Ms. L has no individuals with a background check clearance who are linked to her child care business.¹¹

Ms. L tried to access the background check unit's online application for the employees of her separate business. She found it confusing and difficult to use. She could not find a way to submit an application for someone who was not an employee of the child care provider, but who was instead an employee of a separate business that accessed the child care premises.¹² Ms. L called the CCPO on February 23, 2018. Her call was returned by Ms. Mavis of the CCPO on February 26, 2018. In their conversation, Ms. L discussed her difficulty using the online

⁶ Exs. 15 – 15.60.

⁷ Ex. 7.

⁸ Ex. 8.

⁹ Ms. L's testimony.

¹⁰ Ex. 9.

¹¹ Ms. Benson's testimony.

¹² Ms. L's testimony.

background check application system. Ms. Mavis referred Ms. L to the background check unit for help and Ms. L said she would follow up with the background check unit.¹³

Ms. Benson is a program manager with the background check unit. She explained the process on how to apply for a background check for a person who is not an employee of a child care provider. That process is a bit confusing, because a non-provider applicant has to be initially identified as an employee, but then under “employee” type, the applicant can be identified as someone who does not fit the literal definition of someone who is not a paid employee of the child care business. For instance, there are other “employee” subcategories such as independent contractors, volunteers, and other. Ms. Benson credibly testified that there was no record of Ms. L contacting the background check unit for assistance.¹⁴

III. Discussion

The question presented is whether Ms. L is disqualified from being a child care provider under 7 AAC 41.205 because neither she nor the employees of her separate business timely received background check clearances. 7 AAC 41.205(b) mandates that child care providers and individuals who are associated with that provider are required to pass a background check described in AS 47.05.300 – 390 and 7 AAC 10.900 – 990.

A. Ms. L

Ms. L as the owner and operator of a child care business was clearly required to comply with the background check requirement. Although she was advised on several occasions that she had until December 31, 2017 to comply, she did not do so by December 31, 2017. She had not complied as of February 14, 2018, the date the CCPO notified her that her child care provider approval would be terminated after February 28, 2018. She called the CCPO on February 16 and was told that if she received the necessary background check clearances by February 28, she could retain her approved provider status. Ms. L acted upon that communication and submitted her individual application that day. Although she did not receive her clearance until March 6, which was after the February 28 deadline, and it was not properly linked to her child care provider account until April 12, she, relying upon her February 16 conversation with the CCPO, substantially complied by applying for a background check that same day. Accordingly, the Division has not met its burden of proof on this point. The CCPO cannot terminate Ms. L’s child

¹³ Exs. 10 – 10.2; Ms. Mavis’s testimony.

¹⁴ Ms. Benson’s testimony.

care provider approval based upon her failure to obtain her individual background check clearance.

B. Employees of the separate business

The child care regulations provide that individuals who are “associated” with a child care provider must obtain a background check clearance. The regulations define an individual who is “associated” with a provider to include non-employees of the provider’s child care business if they are physically present at the child care provider’s place of business and have contact with the children in care.¹⁵ The regulations allow an exception for relatives and visitors of the children in care, and occasional guests if they are supervised while on the premises.¹⁶

It is undisputed that Ms. L did not apply for background check clearances for the employees of her separate business. Ms. L first argued that the employees were of her separate business, and not the childcare business and as a result did not need to receive a background check clearance. The regulations, as discussed above, however are clear that if any individual has access to the premises and has contact with the children in care, they must receive a background check clearance. This raises a factual issue: whether the employees of the separate business have contact with the children in Ms. L’s care. The facts show that the employees use the bathroom located in Ms. L’s home. The only separation between the bathroom area and the child care area is a child gate. Consequently, it is more likely true than not true that the employees of her separate business have contact with the children in care.

Ms. L’s second argument was that two of those employees were relatives of the children in her care, and not subject to the background check clearance requirement. It must first be noted that Ms. L has one employee who is not a relative of the children. Consequently, this argument is nonavailing as to him. Second, while there is an exception for relatives, guests, and visitors, the regulations require that their access be supervised. The facts of this case show no supervision. Instead, the employees of Ms. L’s separate business have unfettered access to the child care premises. As a result, the fact that some of them might be related to the children in care did not relieve them of the background check requirements.

Ms. L also argued that she should be excused from compliance for her employees because the online background check process was confusing. Ms. L stated that she could not complete the

¹⁵ An individual who is associated with a care provider includes “any other individual who (A) is present in the entity, including in a residence if services are provided in the residence; and (B) would have regular contact with recipients of services.” 7 AAC 10.900(b)(6).

¹⁶ 7 AAC 100.900(d).

application process because there was no category for persons who weren't employees of the child care provider. As Ms. Brower's testimony provided, there is a mechanism to obtain background checks for employees of separate businesses and other non-employees of the child care provider. Her testimony was corroborated by the instruction manual, sent to Ms. L in September 2017, which explains the application process.¹⁷ That manual walks applicants and employers through the application process. Page 20 of that manual explains that under the employee type, there is an "other" category: "***Employee Type:** The only choice for this type is either an Employee, Independent Contractor, Student or Other."¹⁸ Ms. L therefore had the information available to her to complete the application process for her employees. In addition, she had ample opportunity to try and complete the application process, having been first advised of the requirement in July 2017. As a result, this argument is not persuasive.

As the party seeking to terminate approval of Ms. L's child care provider status, the Division has the burden of proof. The Division has met its burden. Ms. L had employees of her separate business, who had unrestricted access to the child care premises. Although some of them were relatives of the children in care, those relatives as well as the non-relative employee, were required to have a background check clearance. Ms. L did not apply for their background check clearance. Her difficulties in understanding and navigating the background check clearance process do not excuse that failure. As a result, the CCPO correctly terminated Ms. L's approval as a child care provider.

IV. Conclusion

Ms. L's late application and approval for a background check clearance for herself does not support termination of her status as an approved childcare provider. However, she did not apply for a background check clearance for the employees of her separate business, who had contact with the children in her care. Her failure to apply for background check clearances for those employees was a violation of the applicable child care regulations. Consequently, the Division's decision to terminate Ms. L's status as an approved child care provider is upheld.

DATED: May 11, 2018.

By: Signed _____
Lawrence A. Pederson
Administrative Law Judge

¹⁷ Exs. 15.1 – 15.60.

¹⁸ Ex. 15.20 (emphasis in original).

Adoption

The undersigned, by delegation from the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 25th day of May, 2018.

By: Signed
Name: Lawrence A. Pederson
Title: Administrative Law Judge/OAH

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]